

This Opinion is Not a
Precedent of the TTAB

Mailed: October 24, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Ayush Herbs, Inc.

v.

MDR Fitness Corp.

—
Cancellation No. 92061544
—

Ryan M. Kaiser of Amin Talati Upadhye, LLP,
for Ayush Herbs, Inc.

Catherine F. Hoffman and James A. Stepan of Mayback & Hoffman, P.A.
for MDR Fitness Corp.

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Before Bergsman, Lykos and Goodman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

MDR Fitness Corp. (“Respondent”) is the owner of Registration No. 4532087 for the mark CARDIO TONE (standard characters) on the Principal Register for “dietary and nutritional supplements,” in Class 5.¹ Respondent disclaimed the exclusive right to use the word “Cardio.”

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¹ Registered May 20, 2014 based on application Serial No. 85892193 filed April 1, 2013, claiming first use anywhere and first use in commerce as of November 1, 1997.

Ayush Herbs, Inc. (“Petitioner”) filed a Petition to Cancel Respondent’s registered mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Respondent’s mark for the listed goods so resembles Petitioner’s registered mark CARDITONE (standard characters) for “dietary supplements,” in Class 5, as to be likely to cause confusion.² Petitioner also pleaded prior common law use of CARDITONE in connection with dietary supplements.

Petitioner for many years and since long prior to any date of first use upon which Registrant can rely, has adopted and continuously used the term “CARDITONE” as a trademark for use in connection [with] its dietary supplement product.³

Respondent, in its Answer, denied the salient allegations in the Petition for Cancellation.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Respondent’s registration file.⁴ The parties introduced the testimony and evidence listed below:

A. Petitioner’s testimony and evidence.

² Registration No. 4097498, registered February 14, 2014; Section 8 declaration accepted and Section 15 declaration acknowledged.

³ Petitioner for Cancellation ¶1 (1 TTABVUE 3).

⁴ Because Respondent’s registration file is automatically of record, it was not necessary for Respondent to introduce a copy of Respondent’s registration (38 TTABVUE) or registration file (39 TTABVUE).

1. Testimony affidavit of Dr. Shailinder Sodhi, Petitioner's President and cofounder;⁵
2. Testimony affidavit of Gunny Sodhi, Petitioner's Vice President;⁶
3. Notice of reliance on a copy of Petitioner's pleaded registration printed from the USPTO electronic database showing the current status of and title to the registration;⁷
4. Notice of reliance on a copy of the September 23, 2009 Office Action refusing to register the mark in Petitioner's pleaded registration based on Respondent's cancelled registration (Registration No. 2572462) for the mark CARDIO TONE and design for "dietary and nutritional supplements," in Class 5;⁸
5. Notice of reliance on a copy of Respondent's cancelled registration (Registration No. 2572462) for the mark CARDIO TONE and design for "dietary and nutritional supplements," in Class 5, printed from the USPTO electronic database showing the current status of the registration;⁹

⁵ 26 TTABVUE.

⁶ 27 TTABVUE. The confidential exhibits attached to the Gunny Sodhi affidavit are posted at 28 TTABVUE.

⁷ 29 TTABVUE.

⁸ 30 TTABVUE.

⁹ 31 TTABVUE. It was not necessary for Respondent to introduce Respondent's cancelled registration a second time at 40 TTABVUE. Once evidence has been made of record by one party, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence. Trademark Rule 2.120(k)(7), 37 C.F.R. § 2.120(k)(7).

6. Notice of reliance on Respondent's response to Petitioner's interrogatory No. 5 and Respondent's revised responses to Petitioner's first set of interrogatories;¹⁰
7. Notice of reliance on excerpts from the discovery deposition of Patricia Riley, Respondent's Chief Executive Officer and founder;¹¹
8. Notice of reliance on excerpts from magazine websites showing the purported circulation for the magazines in which Respondent purportedly advertised;¹²
9. Notice of reliance on an excerpt from Amazon.com showing an advertisement for Respondent's product;¹³ and
10. Rebuttal testimony affidavit of Gunny Sodhi.¹⁴

B. Applicant's testimony and evidence.

1. Notice of reliance on Respondent's cancelled registration file history;¹⁵
2. Notice of reliance on excerpts from Respondent's website;¹⁶
3. Notice of reliance on excerpts from Respondent's website printed from the Wayback Machine;¹⁷

¹⁰ 32 TTABVUE. Responsive documents designated confidential are posted at 33 TTABVUE.

¹¹ 34 TTABVUE. Confidential exhibits are posted at 35 TTABVUE.

¹² 36 TTABVUE.

¹³ 37 TTABVUE.

¹⁴ 54 TTABVUE.

¹⁵ 41 TTABVUE.

¹⁶ 42 TTABVUE.

¹⁷ 43 TTABVUE.

4. Notice of reliance on excerpts from Petitioner's website;¹⁸
5. Notice of reliance on a copy of Respondent's Patent No. 5976568;¹⁹
6. Notice of reliance on a copy of Respondent's Patent No. 5948443;²⁰
7. Notice of reliance on an excerpt from the RUVED.com website;²¹
8. Notice of reliance on copies of 70 third-party registrations and their prosecution history files for registered marks containing the term "Cardio" and one registration and its prosecution file history for a mark containing the term "Cardi," all registered for dietary or nutritional supplements or vitamins;²² and
9. Testimony declaration of Patricia Riley, Respondent's Chief Executive Officer and founder.²³

II. Standing

A threshold issue in every inter partes case is the plaintiff's standing to challenge registration. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). To establish its standing, Petitioner must prove that it has a "real interest," i.e., a "reasonable" basis for its belief of damage. *See*

¹⁸ 44 TTABVUE.

¹⁹ 45 TTABVUE.

²⁰ 46 TTABVUE.

²¹ 47 TTABVUE.

²² 48-49 TTABVUE.

²³ 50-52 TTABVUE. The confidential exhibits attached to the Riley declaration are posted at 53 TTABVUE.

Empresa Cubana, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Petitioner has established its standing by properly introducing into evidence its pleaded registration. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Applicant, in its brief, does not contest Petitioner's standing.

III. Priority

In a cancellation proceeding, it is the Board's practice "to hold that [as a practical matter] a petitioner, whether a registrant or not, must, in the first instance, establish prior rights in the same or a similar mark and the respondent in turn can defeat the petitioner's claim of damage by establishing that, as between the parties, it possesses [prior] superior rights in the mark sought to be cancelled." *Brewski Beer Co. v. Brewski Bros. Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (quoting *U.S. Mineral Prods. v. GAF Corp.*, 197 USPQ 301, 305 (TTAB 1977)); *Pamex Foods, Inc. v. Clover Club Foods, Inc.*, 201 USPQ 308, 313 (TTAB 1978) ("Thus, the Board has taken the position, in essence, that the registrations of each party offset each other; that petitioner as a plaintiff, must, in the first instance, establish prior rights in the same or similar mark . . ."). *See also Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1474 (TTAB 2014) ("In a cancellation proceeding such as this one where both parties own registrations, priority is in issue.").

Of course, Petitioner or Respondent may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date. Thus, a petitioner—whose application filing date was earlier than respondent’s application filing date—could take its chances and elect to make of record simply a copy(s) of its registration(s). Trademark Rules 2.122(d)(1) and 2.122(d)(2). By so doing, petitioner’s proven first use date of its mark would then be the filing date of the application, i.e. its constructive use date. However, if respondent thereafter proved an actual first use date pre-dating petitioner’s filing date, the issue of priority, and hence petitioner’s Section 2(d) claim, would be resolved in favor of respondent.

Petitioner’s pleaded registration (Registration No. 4097498) was registered on February 14, 2012 based on an application filed on June 24, 2009. Respondent’s registration issued May 20, 2014 based on an application filed April 1, 2013. However, Patricia Riley, Respondent’s Chief Executive Officer and founder, testified that the records of her company show that Respondent sold CARDIO TONE products at least as early as September 4, 1997.²⁴

Dr. Shailinder Sodhi, Petitioner’s President and founder, testified that Petitioner “adopted the CARDITONE mark and began selling CARDITONE in the state of Washington in 1990. We expanded sales of CARDITONE beyond Washington in 1993.”²⁵ Gunny Sodhi, Petitioner’s Vice President, introduced a “Profit Analysis Item

²⁴ Riley Testimony Decl. ¶¶16-20 and Exhibit 5 (confidential) (50 TTABVUE 8 and 53 TTABVUE 3-1146).

²⁵ Shailinder Sodhi Testimony Aff. ¶3 (26 TTABVUE 8). *See also* Shailinder Sodhi Testimony Aff. ¶7 (26 TTABVUE 9) (“Since 1993, [Petitioner] has marketed and sold CARDITONE

Summary” derived from Petitioner’s accounting software showing sales of CARDITONE in 1995.²⁶ Also, Petitioner introduced a copy of a product catalog from 1996 advertising the sale of CARDITONE dietary supplements.²⁷

We find that Petitioner has proven prior use of its CARDITONE mark. Applicant, in his brief, does not contest Petitioner’s priority.²⁸

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*Du Pont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *Du Pont* factor that is relevant or for which there is evidence of record. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any

(using the CARDITONE trademark) throughout the U.S. continuously and without interruption.”).

²⁶ Gunny Sodhi Testimony Aff. ¶6 and Exhibit 5 (confidential) (27 TTABVUE 10 and 28 TTABVUE 3).

²⁷ Shailinder Sodhi Testimony Aff. ¶7 and Exhibit 3 (26 TTABVUE 9 and 22-29).

²⁸ “[T]o the extent that [Petitioner] has priority for use in interstate commerce, it is not by much.” Respondent’s Brief, p. 2 (59 TTABVUE 7).

likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity and nature of the goods, established, likely-to-continue channels of trade and consumers to whom sales are made.

The description of goods in Petitioner’s pleaded registration is “dietary supplements.”²⁹ The description of goods in Respondent’s registration is “dietary and nutritional supplements.”³⁰ Accordingly, the goods are in part identical.

Because the goods described in Respondent’s registration and Petitioner’s registration are in part identical, we presume that the channels of trade and classes

²⁹ Dr. Shailinder Sodhi testified that “CARDITONE is a dietary supplement which was carefully formulated to help maintain blood pressure and support heart function.” Shailinder Sodhi Testimony Aff. ¶4 (26 TTABVUE 8). *See also* Gunny Sodhi Testimony Aff. ¶3 (27 TTABVUE 9) (“[Petitioner] sells a number of dietary supplements. One of [Petitioner’s] products is CARDITONE, which is used to support heart health.”).

³⁰ Patricia Riley testified that “CARDIO TONE products are dietary and nutritional supplements directed at persons with heart issues or a family history of heart issues.” Riley Testimony Decl. ¶5 (50 TTABVUE 6).

of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Respondent argues that Petitioner's CARDITONE dietary supplements are Ayurvedic products and Respondent's products are not.³¹ However, we must consider the goods as they are described in the registrations at issue. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). *See also Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). We also do not read limitations into the

³¹ Respondent's Brief, p. 6 (59 TTABVUE 11).

identification of goods. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Therefore, we must presume that Petitioner’s dietary supplements and Respondent’s dietary and nutritional supplements include all types of dietary supplements including Ayurvedic products.

Respondent also argues that the presumptions are rebutted by Petitioner’s own testimony that the goods are not offered for sale by the same retailers.³² However, when there is no limitation in a party’s identification of goods, the Board must presume that the party’s goods move in all channels of trade that would be normal for such goods, and that they would be purchased by all potential customers. This is so despite the fact that the evidence reveals that the goods are sold through different channels of trade. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Morton-Norwich Prods., Inc. v. N. Siperstein, Inc.*, 222 USPQ 735, 736 (TTAB 1984); *In re Heat Mirror Assoc.*, 219 USPQ 1015, 1017 (TTAB 1983); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Moreover, channels of trade change and either party could at any time decide to distribute their products in multiple or

³² Respondent’s Brief, p. 7 (59 TTABVUE 12).

different channels of trade. *Evans Prods. Co. v. Boise Cascade Corp.*, 218 USPQ 160, 163 (TTAB 1983).

B. The number and nature of similar marks in use on similar goods.

Respondent introduced one third-party registration for the mark CARDI-RITE registered for vitamin preparations³³ and 70 third-party registrations containing the term “Cardio” registered from a variety of dietary and nutritional supplements.³⁴ While third-party registrations are not evidence of use under the sixth *Du Pont* factor, they may be used to show the sense in which a term is used in ordinary parlance (*i.e.*, that a term has a well-recognized meaning). See *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1406 (TTAB 2018). The third-party registrations show that the term “Cardio” has descriptive significance in connection with dietary and nutritional supplements. This is corroborated by Patricia Riley’s testimony that her company’s CARDIO TONE nutritional supplements are sold to persons with heart issues,³⁵ Gunny Sodhi’s testimony that Petitioner’s CARDITONE and Respondent’s CARDIO TONE are “directly competitive,”³⁶ and the fact that Respondent disclaimed the exclusive right to use the term “Cardio” in response to the

³³ 48 TTABVUE 12.

³⁴ 48 TTABVUE 67-3857 and 49 TTABVUE.

³⁵ Riley Testimony Decl. ¶5 (50 TTABVUE 6); Riley Discovery Dep., p. 13 (34 TTABVUE 13).

³⁶ Gunny Sodhi Testimony Aff. ¶4 (27 TTABVUE 9).

requirement by the Examining Attorney on the ground “Cardio” is merely descriptive of a feature of Respondent’s products.³⁷ Because “Cardio” is merely descriptive when used in connection with dietary or nutritional supplements and is entitled to only a narrow scope of protection or exclusivity of use.

The evidence with respect to the term “Cardi,” consisting of one third-party registration, reflects a far more modest amount of evidence than found convincing in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 112 1136 (Fed. Cir. 2015) and *Juice Generation* wherein “a considerable number of third parties’ use of similar was shown.” *Id.* The evidence regarding the weakness of the term “Cardi” is not nearly as persuasive as that in either *Jack Wolfskin* or *Juice Generation*.

Even if we find that the term “Cardi” suggests or describes “Cardiovascular” effects, none of the 71 third-party registrations introduced by Respondent is as close to Petitioner’s mark CARDITONE as Respondent’s mark CARDIO TONE. In this regard, we note that none of the third-party registrations include the word “Tone.”

C. The similarity or dissimilarity of the marks

We turn next to the *Du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *Du Pont*, 177 USPQ at 567. In comparing the marks, we are mindful that where, as here, the goods are in part identical, the

³⁷ July 3, 2013 Office Action and January 3, 2014 Response to Office Action in Respondent’s Application Serial No. 85892193.

degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 101 USPQ2d at 1721. *See also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Inasmuch as the goods at issue are dietary supplements, the average customer includes consumers with an interest in healthful nutrition.

We begin our comparison of the marks by noting that the space between the words “CARDIO” and “TONE” in Respondent’s mark CARDIO TONE that is missing between the terms “CARDI” and “TONE” in Petitioner’s mark CARDITONE is not significant. *See, e.g., In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987) (affirming the Board’s finding that FirstTier is the phonetic equivalent of “first tier”); *Armstrong Mfg. Co. v. Ridge Tool Co.*, 132 USPQ 158, 56 USPQ 165, 166 (CCPA 1942) (“Vistand” is the equivalent of “vise stand”); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”) (Emphasis in the original). *Cf. Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“[i]t is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words”). Respondent has not provided any reason for us to depart from established precedent.

In this regard, we note that because Petitioner’s registration for the mark CARDITONE is in standard character form, the rights reside in the wording and not in any particular display. Petitioner may depict CARDITONE in any manner, regardless of the font style, size, or color, and might at any time in the future be displayed in a manner approaching Respondent’s display (e.g., CardiTone). *In re*

Viterra Inc., 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).

The marks are similar in sound and appearance. Both marks begin with CARDI and end in TONE. The primary difference between Respondent's mark CARDIO TONE and Petitioner's mark CARDITONE is the letter "O" in Respondent's mark CARDIO TONE. "As seen and spoken, this middle portion may be missed by many of the relevant purchasers." *Alfacell v. Anticancer Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE is similar to ONCONASE); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (CAYNA is similar to CANA).

As to meaning, we find that the respective marks CARDITONE or CARDIO TONE connote that each product has something to do with heart health. While each mark may be suggestive, the marks convey the same basic idea—heart fitness—and, thus, engender similar commercial impressions. As noted above, Patricia Riley testified that her company's CARDIO TONE nutritional supplements are sold to persons with heart issues,³⁸ and Gunny Sodhi testified that Petitioner's CARDITONE and Respondent's CARDIO TONE are "directly competitive."³⁹

Considering the similarities between the marks in sound, appearance, connotation and commercial impression and taking into account the fallibility of human memory over a period of time, a factor that becomes important if a purchaser encounters one of these products some weeks or months apart, the marks are similar.

³⁸ Riley Testimony Decl. ¶5 (50 TTABVUE 6); Riley Discovery Dep., p. 13 (34 TTABVUE 13).

³⁹ Gunny Sodhi Testimony Aff. ¶4 (27 TTABVUE 9).

Respondent argues that Petitioner “has no trademark rights to ‘cardio’ and the addition of the letter ‘o’ and the space between the words, i.e. CARDITONE vs. CARDIO TONE, is enough of a difference in a crowded field.”⁴⁰ We disagree. First, Petitioner does not claim any rights to the term “Cardio” per se. Petitioner’s mark is CARDITONE and it is that mark to which it claims rights. In fact, Petitioner’s mark does not even contain the term “Cardio.” Second, with respect to Respondent’s addition of the letter “o,” as noted above, it may be missed by a significant segment of the purchasing public. Slight differences in marks do not normally create dissimilar marks. *See Alfacell v. Anticancer Inc.*, 71 at 1305 (ONCASE is similar to ONCONASE); *In re Great Lakes Canning, Inc.*, 227 USPQ at 485 (CAYNA is similar to CANA). *See also U.S. Mineral Prods. Co. v. GAF Corp.*, 197 USPQ at 306 (“‘AFCO’ and ‘CAFCO,’ which differ only as to the letter ‘C’ in USM’s mark, are substantially similar in appearance and sound”); *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) (“The mark of the applicant, ‘KIKS’ and the cited mark ‘KIKI’ differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation”). Finally, as noted above, we find that the space between CARDIO and TONE in Respondent’s mark that is missing in Petitioner’s mark CARDITONE is not significant. According to the case law cited above, adding or omitting a space between two words does not change the meaning or commercial impression engendered by those terms and we see no compelling reason to find differently in this case.

⁴⁰ Respondent’s Brief, p. 4 (59 TTABVUE 9).

In view of the foregoing, we find that the marks CARDIO TONE and CARDITONE are similar in their entireties in terms of appearance, sound, connotation, and commercial impression.

D. The nature and extent of any actual confusion and the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.⁴¹

Patricia Riley testified that Respondent has been using the mark CARDIO TONE to identify dietary and nutritional supplements since at least as early as 1997,⁴² and that she is unaware of any reported instances of confusion.⁴³ The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Respondent of its mark for a significant period of time in the same markets as those served by Petitioner under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the

⁴¹ The testimony by Gunny Sodhi that Petitioner's "Customer Care Team" has received telephone calls from consumers confused as to the source of the CARDIO TONE product is not entitled to any probative value because it is hearsay (i.e., statements from Petitioner's employees, declarants who are unavailable for cross examination, about what customers, other declarants unavailable for cross examination, are saying). Gunny Sodhi Testimony Aff. ¶31 (27 TTABVUE 18). See *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 204 USPQ 697, 701 (CCPA 1980) (testimony by a customer of Georgia-Pacific regarding what his customers told him is hearsay).

⁴² Riley Testimony Decl. ¶¶16-17 and 19-20 (50 TTABVUE 8).

⁴³ *Id.* at ¶67 (50 TTABVUE 20).

probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enter. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”).

In its brief, Respondent makes a point of the fact that Petitioner’s CARDITONE is an Ayurvedic product based on the principles of Ayurvedic medicine while Respondent’s products have no connection with Ayurveda,⁴⁴ showing “that there is no opportunity for consumers to choose between CARDITONE and CARDIO TONE products.”⁴⁵ One of Petitioner’s brochures explains Ayurvedic medicine as follows:

Ayurveda, The Science of Life

Practiced for more than 5,000 years, Ayurvedic Medicine is one of the world’s oldest systems of healing. Meaning, literally, “The Science of Life”, Ayurvedic treatments involve many strategies to restore optimal health and function. These include nutritional therapy, cleansing treatments, herbal supplements, stress reduction techniques and exercise.

Ayurveda appeals to a growing number of people today who are eager to understand the source of illness and take a more active role in their own health. Like other holistic medicine systems, Ayurveda considers the whole person in

⁴⁴ Respondent’s Brief, pp. 3-4 and 6 (59 TTABVUE 8-9 and 11). *See also* Riley Testimony Decl. ¶¶ 50 and 51 (50 TTABVUE 17) (Respondent has no intention of selling products based on Ayurveda).

⁴⁵ Respondent’s Brief, p. 9 (59 TTABVUE 14).

diagnosis and treatment of disease and is prevention oriented.⁴⁶

Patricia Riley testified that Respondent always displays its CARDIO TONE products on its bottles in close conjunction to its house marks “MDR” and “Medical Design Research.”

23. As with other [Respondent’s] products, [Respondent] sells its CARDIO TONE bottles with the words “MDR” and “Medical Research Design.” This is done so that consumers know that the products are from [Respondent]. The words “MDR” and “Medical Design Research” appear just under the bottle cap, above the word “Cardio Tone.”

24. All of [Respondent’s] CARDIO TONE products sold since the first sale to the present contained the words “MDR” to indicate that the products are from [Respondent]. [Respondent] intends to continue to place the words “MDR” on all CARDIO TONE products in the future.⁴⁷

In addition, Respondent’s products are primarily sold through Respondent’s website and “other online retailers.”⁴⁸

62. ... [Respondent] primarily markets to its customers via www.mdr.com, mail order, brochures, direct response from customers, over 1000 infomercials and promotional videos (some but not all of which are available on Youtube [sic]), internet and television. [Respondent] also sends out targeted emails to its customers and has advertised on Facebook and via Google.

63. In the past, [Respondent] advertised in a variety of print magazines such as People, Newsweek, Rolling Stone, Prevention, Reader’s Digest, and Men’s Health. However,

⁴⁶ Shailinder Sodhi Testimony Aff. Exhibit 4 (26 TTABVUE 30).

⁴⁷ Riley Testimony Decl. ¶¶23 and 24 (50 TTABVUE 9).

⁴⁸ *Id.* at ¶62 (50 TTABVUE 19). *See* Gunny Sodhi Testimony Aff. ¶20 (27 TTABVUE 15) (witness was only able to find Respondent’s CARDIO TONE at viewvitamins.com which does not sell Petitioner’s CARDITONE and could not find Respondent’s CARDIO TONE on Amazon.com).

[Respondent] no longer advertises much in print magazines because the market for print magazines has declined considerably with the growth of the internet.⁴⁹

Respondent does not sell its products in brick-and-mortar stores.⁵⁰

Dr. Shailinder Sodhi, Petitioner's President and founder, testified that Petitioner first used the mark CARDITONE to identify dietary and nutritional supplements in the state of Washington in 1990 and expanded beyond Washington in 1993.⁵¹ Petitioner sells CARDITONE online on its website at ayush.com, as well as through online retailers such as Amazon.com and iHerb.com, through brick-and-mortar health food stores, and through private health care practitioners.⁵² Gunny Sodhi testified that he is not aware of any online retailer who sells the products of both parties.⁵³ Shailinder Sodhi and Gunny Sodhi are not aware of any brick-and-mortar store or health care practitioner that has sold the products of both parties.⁵⁴ Petitioner attends a number of trade shows each year to promote its products, including the CARDITONE® product.

We usually have a table or booth at these shows. Some of the shows we promote the CARDITONE® product at include: The Natural Products Expo West; Supply Side

⁴⁹ Riley Testimony Decl. ¶¶62 and 63 (50 TTABVUE 19).

⁵⁰ Riley Discovery Dep., p. 24 (34 TTABVUE 14).

⁵¹ Shailinder Sodhi Testimony Aff. ¶3 (26 TTABVUE 8).

⁵² *Id.* at ¶¶9-11 (26 TTABVUE 10). *See* Gunny Sodhi Testimony Aff. ¶20 (27 TTABVUE 15) (sales through vitaminshoppe.com, pureformulas.com, pureprescriptions.com, and others).

⁵³ Gunny Sodhi Testimony Aff. ¶20 (27 TTABVUE 15).

⁵⁴ Shailinder Sodhi Testimony Aff. ¶¶10-11 (26 TTABVUE 10); Gunny Sodhi Testimony Aff. ¶¶21-22 (27 TTABVUE 16).

West; AANP; SIO; ANP; ONC; NAMA; OANP; WANP; and AZNMA.⁵⁵

Petitioner has also advertised its products in printed publications such as Naturopathic Doctor News and Review, Vitamin Retailer, Nutrition Industry Executive Magazine, and Expo West Magazine.⁵⁶

Although Respondent always uses its mark in close connection with its house marks “MDR” and “Medical Design Research” and the parties offer their products in different channels of trade, the products have been sold concurrently to the same classes of consumers since at least 1997 or for over 20 years.⁵⁷ Under these circumstances, we find that the lack of any reported instances of confusion weighs against finding that there is a likelihood of confusion.

E. Analyzing the factors.

In this case, the lack of any reported instances of confusion, while weighing against finding a likelihood of confusion, is not so clear cut as to outweigh the other *Du Pont* factors. *See Citigroup Inc.* 98 USPQ2d at 1253 (no likelihood of confusion because the marks were dissimilar and there were no reported instances of actual confusion despite the opportunity for confusion to have occurred). Despite the lack of

⁵⁵ Shailinder Sodhi Testimony Aff. ¶¶12 (26 TTABVUE 10).

⁵⁶ Gundy Sodhi Testimony Aff. ¶28 (27 TTABVUE 17).

⁵⁷ Because the description of goods are in part identical, we must presume that the channels of trade are the same for that *Du Pont* factor. *See* the discussion *supra*. However, in determining whether there has been a reasonable opportunity for confusion to have occurred, we must consider the evidence regarding how the goods actually have been sold. Therefore, we assess the evidence regarding the channels of trade and classes of consumers; otherwise, we would be make a finding of fact regarding the lack of any reported instances of confusion based on a presumption rather than reality.

any reported instances of confusion over the past 20 years, because the marks are similar, the goods are in part identical and there is a presumption that the goods are offered in the same channels of trade and are sold to the same classes of consumers, we find that Respondent's mark **CARDIO TONE** for "dietary and nutritional supplements" is likely to cause confusion with the registered mark **CARDITONE** for dietary supplements.

Decision: The petition for cancellation is granted.